In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-348

DAVID JOHN ODLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a first-class letter from Colombia could not be opened for customs inspection.

After a jury-waived trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of importing 8.8 grams of cocaine into the United States, in violation of 21 U.S.C. 952(a) and 960. He was sentenced to a term of two years' imprisonment to be followed by three years' special parole. The court of appeals affirmed on August 21, 1974 (Pet. App. 5a-12a). The petition for a writ of certiorari was filed on September 27, 1974, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1]

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[1]On September 20, 1974, Mr. Justice Rehnquist denied petitioner's motion for an extension of time. On September 13, 1974, the court of appeals stayed its mandate in this case for 30 days. The stay of mandate, however, does not suspend the finality of the court's judgment and therefore does not extend the time within which to petition for certiorari. *Boylan* v. *United States*, 257 U.S. 614.

On or about May 1, 1973, New York customs officials opened a first-class envelope, mailed from Medellin, Colombia. The envelope was thick and red, and contained a cardboard greeting card and 8.8 grams of cocaine (Pet. App. 5a-6a). The envelope was re-sealed and forwarded to its addressee for a controlled delivery (App. 3a).[2] Petitioner received the envelope and gave a receipt for it in the name of its addressee (Tr. 71, 89). Pursuant to a search warrant, customs agents shortly thereafter searched the premises and discovered three opened letters from Bogota, Colombia, each similar to the one just delivered, and an additional sealed envelope containing a greeting card and 5.83 grams of cocaine. The agents also discovered and seized a quantity of marihuana; cigarette papers; 163 grams of what appeared to be cocaine; a bottle containing white powder, marked "stearic acid"; the letter here in question; and $7,600 in cash (App. 4a-8a). The district court suppressed the cash but admitted the other articles seized, holding that the customs authorities have a right, implicit in the country's power to protect itself against illegal importations, to inspect entering letters at random (Tr. 47, 50-51).

On appeal the government argued that the unusual appearance of the thick envelope, coming from a country which is often a source of narcotics imported into the United States, also supported the search because it furnished suspicion sufficient to justify the search of this particular letter. The court of appeals chose the district court's broader ground and held that "the Government is free to spot-check incoming international mail at the port of entry, or to inspect all such mail * * * which attracts the inspector's attention" (Pet. App. 8a). We submit that there is no occasion for this Court to review that ruling.

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[2]The government is lodging with the Court the government appendix in the court below ("App.") and the trial transcript ("Tr.").

The inspection of the envelope by the New York customs authorities was a border search, conducted at the border.[3] The government has an unquestioned right to inspect the baggage of persons entering the country. *Carroll* v. *United States*, 267 U.S. 132, 153-154; *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272. The government's right to make this search is predicated on the need to ferret out contraband and dutiable material that is often cleverly hidden in packages or baggage in a way that prevents the government from acquiring even a reasonable suspicion that a particular package contains a smuggled article. If random, suspicionless searches were prohibited, smugglers would in most cases be immune from detection.

Petitioner argues in this case that a smuggler should be immune from detection if he chooses to import his contraband in a first class envelope. The contention is unpersuasive. Although first class envelopes often contain personal correspondence that should be free from governmental supervision, it is the correspondence, and not the mode of its transportation, that should be free from regulation and intrusion. There is nothing intrinsic to the first class envelope that restricts its contents to protected correspondence; the envelope can, and as this case demonstrates often does, contain material to which no interest in privacy attaches.

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[3] No "extended" border search is presented here. Cf. *United States* v. *Brignoni-Ponce*, 499 F. 2d 1109 (C.A. 9), certiorari granted October 15, 1974, No. 74-114; *United States* v. *Ortiz* (C.A. 9, No. 74-1249, decided June 19, 1974), certiorari granted, October 15, 1974, No. 73-2050.

The case would be different were there a claim that personal correspondence was being read or tampered with. But the customs inspections do not create that sort of intrusion; once it has been ascertained that no prohibited or dutiable material is contained, the letter resumes its journey without regard to its message. Cf. *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 376-377. Although even the opening of the envelope entails a slight invasion of privacy when the envelope contains only personal correspondence rather than contraband, it is impossible to make that judgment except on a *post hoc* basis, just as it is impossible to make such a judgment when customs inspectors open a package rather than an envelope. There is a limited invasion of privacy, but the invasion is justified by the circumstances that authorize the customs search in the first instance. Similarly, there is an invasion of privacy when an individual crossing the border is stopped and he and his vehicle are subject to search. *Almeida-Sanchez, supra*, 413 U.S. at 272. If a personal search is authorized on crossing the border, the less intrusive search of an impersonal envelope also should be authorized.

In any event, the search of the particular envelope in question was reasonable. The envelope was not a wafer-thin aerogramme incapable of holding a foreign substance. It was instead a bulky and stiff envelope that, as well as a cardboard box, could disguise its contents unless opened. We submit, therefore, that if different

standards should be applied to packages than to first-class envelopes, that this envelope, partaking of the concealing characteristics of packages, should be judged by the package standards. Under those standards the customs check was permissible.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.